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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 864

BEATRICE ANTONETTE TRAMONTANA,

Petitioner,

v.

VARIG AIRLINES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Beatrice Antonette Tramontana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 10, 1965.[1]

OPINION BELOW

The only opinion rendered in this proceeding was that of the Court of Appeals for the District of Columbia Cir-

[1] The proceeding in the Court of Appeals was entitled Beatrice Antonette Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, a Brazilian corporation, t/a Varig Airlines. The respondent herein is designated by its American trade name.

cuit, dated June 10, 1965. It is reported at 350 F.2d 468, and is attached as an appendix hereto.

JURISDICTION

On October 14, 1963, the United States District Court entered a judgment in petitioner's favor for $170, the then current United States equivalent of 100,000 Brazilian cruzeiros. Judgment was simultaneously entered in respondent's favor "for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00) herein above awarded to the plaintiff."

On June 10, 1965, the Court of Appeals affirmed that part of the District Court judgment in respondent's favor. And on October 4, 1965, upon a timely filed petition for rehearing *en banc*, the Court of Appeals entered an order denying the requested rehearing, Circuit Judge Wright dissenting from the denial. This petition is filed within 90 days following that denial.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Where an American resident, as the widow and administratrix of one of 18 American servicemen stationed in the District of Columbia and killed in a mid-air plane collision in Brazil, brings a wrongful death action against a Brazilian airline company in a federal district court in the District of Columbia,

(1) Is the federal court, as a matter of federal law, bound to apply the District of Columbia policy of unlimited damage recovery for wrongful death and to ignore the Brazilian law limiting such recovery to a maximum of 170 American dollars?

(2) Does any provision of the Constitution of the United States preclude a federal court in the District of Columbia from framing and applying the District conflicts law so

as (a) to prevent a Maryland resident from obtaining the benefit of the District's unlimited recovery policy solely because of non-residence in the District and (b) to limit the Maryland resident to a maximum recovery of $170 as provided by Brazilian law despite the Maryland policy of allowing unlimited recovery for wrongful death?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Article IV, Section 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

Article IV, Section 2: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment V: No person shall be . . . deprived of life, liberty, or property, without due process of law.

Amendment XIV, Section 1: No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

District of Columbia Code:

Title 11, Section 521 (a): . . . the United States District Court for the District of Columbia . . . has original jurisdiction of all: (1) civil actions between parties, where either or both of them are resident or found within the District . . .

Title 16, Section 1201: Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default, of any person or corporation, . . . the person who or corporation which would have been liable

if death had not ensued shall be liable to an action for damages for such death, . . . and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the spouse and next of kin of such deceased person, and shall also include the reasonable expenses of last illness and burial . . .

Annotated Code of Maryland (1957):

Article 67, Section 4: . . . in every such [wrongful death] action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . .

Brazilian Code of the Air, published in Diario Oficial of June 27, 1938 (as amended to 1947), **Chapter VIII, Mid-Air Collisions and Accidents:**

Article 96 — The provisions relative to the liability of a carrier to third parties, shall embrace any aircraft which operates over Brazilian territory, whether public or private, domestic or foreign.

Article 97 — Any damage caused by an aircraft in flight while executing takeoff or landing procedures, to individuals or to property on the ground shall give rise to a right of indemnification.

Article 100 — The following shall be jointly liable for damages referred to in the preceding articles:

a) The person in whose name the aircraft is registered.

b) The person who uses or operates the aircraft.

c) Whoever on board the aircraft caused the damage . . .

Article 102 — The joint liability with respect to each accident shall be limited:

a) in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (Cr. $100,000.00) for each person;

b) in the case of damage or destruction of property to a recovery equal to the fair value of the property.

Sole paragraph. The person liable shall not be entitled to benefit by these limits, if the party in interest can prove that the damage was the result of intentional wrongdoing.

STATEMENT

This case is one of three instituted in the United States District Court for the District of Columbia growing out of a mid-air collision of two airplanes over Rio de Janeiro, Brazil, on February 25, 1960. Eighteen plaintiffs are involved in the three suits.[2]

In all three cases a motion for summary judgment was made by the respective defendants as to so much of the plaintiffs' claims as exceeded the dollar equivalent of one hundred thousand (100,000) cruzeiros in Brazilian currency for each of the deaths for which the several plaintiffs sought damages. Orders granting summary judgment as so prayed were entered by the District Court in the three proceedings. An appeal was then perfected in the instant case, the other two being ordered "stetted pending final disposition of any appeal taken in the case of Beatrice Antonette Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein."

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[2] The instant appeal involves only one of the three suits, Civil Action No. 637-62, brought by one plaintiff, the petitioner herein. The other two cases are: Civil Action No. 592-61, *Armiger, et al. v. Real S.A. Transportes Aereos*, brought by eleven plaintiffs; Civil Action No. 600-61, *Albrecht, et al. v. Real S.A. Transportes Aereos*, brought by six plaintiffs.

As indicated, the incident giving rise to this three-pronged litigation was the collision of two planes over Rio de Janeiro, Brazil. The two planes were a civilian DC-3 aircraft, owned by Real S.A. Transportes Aereos (a Brazilian corporation t/a Real Airlines), and a United States Navy R6D-1 aircraft. J.A.6. Included on board the Navy aircraft were 18 members of the United States Navy Band, on tour in South America. All 18 were killed instantly.

The fact that the United States Navy Band is a military establishment stationed in the District of Columbia is a well-known fact of public record. As revealed in findings of fact incorporated by the opinion of the Court of Claims dealing with an unrelated facet of this same accident, *Armiger v. United States*, 339 F.2d 625, 633,[3] the Navy Band is permanently stationed in Washington, D.C., being headquartered at the Sail Loft of the Navy Yard. Findings 3 and 7. Each member, including the 18 decedents, is an enlisted man in the Regular Navy and subject to military orders; the administrative control of members is in the hands of the Commanding Officer of the U.S. Navy Station in Washington, D.C. Findings 5 and 7. The functions of the Band include participation in official Government events and concerts, both within and outside the District of Columbia. Finding 4. And the South American tour, on which the fatal accident occurred, was an official event that both began and ended in Washington, D.C. Finding 24.

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[3] The *Armiger* case, twice referred to in the opinion below, was a Congressional reference matter. The Court of Claims there recommended, based on equitable considerations, that the United States pay the estate of each of the 18 deceased Navy Bandsmen the sum of $25,000. There was found to have been an unwarranted failure by Band personnel to follow the usual practice of distributing commercial flight insurance application forms prior to the fatal flight, as a result of which the decedents left no insurance. Congress has yet to act on the recommendation. See H.R. 5912 and S. 1503, 89th Cong., 1st Sess.

The instant suit was filed in the District Court on February 23, 1962, by the petitioner, the widow of one of the deceased Bandsmen. She sued in her individual capacity and as the duly appointed and qualified administratrix of her husband's estate. She was identified in the caption of the amended complaint as residing "c/o Mr. Vincent Cozzolino, 1613 Dayton Road, West Hyattsville, Maryland." J.A. 1. The various plaintiffs in the other two actions also sued in their individual capacities and as administratrix or executrix of the deceased Bandsmen; some also sued as the mother and next friend of minor children of the deceased. Of the other 17 plaintiffs, three were listed as residents of the District of Columbia, eight as residents of nearby Maryland communities, and the remainder scattered among New York, California, North Carolina, Pennsylvania and Wisconsin.

The named defendants were Real S.A. Transportes Aereos, t/a Real Airlines, and its successor assignee, S.A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines. Both defendants were identified as Brazilian corporations with offices in the District of Columbia. J.A. 1. Service of process was later quashed as to Real Airlines, leaving as the sole defendant — and the respondent herein — its successor assignee, Varig Airlines.

The suit was instituted under the provision of the District of Columbia Code[4] that invests jurisdiction in the United States District Court over all civil actions between parties where either or both of them are resident or found within the District of Columbia. It was alleged that the negligent acts of the defendant Real Airlines, in the operation of its plane that collided with the Navy aircraft, had caused the death of petitioner's husband in Brazil on

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[4] At the time the suit was instituted, the provision was known as 11 D.C. Code § 306; it has since been recodified as 11 D.C. Code §521(a).

February 25, 1960.[5] Judgment was sought in the amount of $250,000.

The amended complaint further alleged that the negligence with respect to the operation of the Real plane was "in violation of various provisions of the Brazilian law." J.A. 2. Articles 127, 128, 129, 130 and 132 of the Brazilian Code of the Air, dealing with liability respecting injury or death suffered in mid-air collisions and accidents, were then set forth in detail. J.A. 2-3.

On July 3, 1963, the respondent Varig Airlines filed an answer to the amended complaint, denying the allegations of jurisdiction and negligence. Thereafter Varig Airlines filed a motion for summary judgment in its favor or, in the alternative, "for summary judgment for the defendant for so much of plaintiff's claim as exceeds the U.S. equivalent of 100,000 cruzeiros, Brazilian currency." J.A. 5. Attached to the motion were copies of Articles 96, 97, 98, 100 and 102 of the Brazilian Code of the Air, Article 102 of which provides for a limitation of an air carrier's liability "in the case of physical injury or death to a maximum recovery of one hundred thousand cruzeiros (cr. $100,000.00) for each person."

On October 14, 1963, following a hearing, the District Court entered an "Order Granting Summary Judgment" as follows (J.A. 37-38):

(1) Judgment was entered in favor of the petitioner against the respondent Varig Airlines "in the amount of One Hundred Seventy Dollars ($170.00) without costs to either party and . . . execution therefore be had." This part of the judgment was premised upon the consent of

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[5] The record reveals that the Navy plane, with petitioner's husband aboard, had started its flight in Buenos Aires, Argentina. The Real plane was concluding a flight from Campos, Brazil, which is northeast of Rio de Janeiro. Both planes were being directed toward landings at the time of the collision.

counsel for Varig Airlines to a judgment in petitioner's favor for $170.00, "being the dollar value at current rates of exchange of one hundred thousand (100,000) cruzeiros of Brazilian currency."

(2) Judgment was also awarded in favor of the respondent Varig Airlines and against petitioner, without costs, "for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00) hereinabove awarded to the plaintiff." This was the portion of the judgment that was the basis of petitioner's appeal to the Court of Appeals.

The Court of Appeals affirmed the action of the District Court in awarding judgment to Varig Airlines for all of petitioner's claim in excess of $170. In so doing, the Court of Appeals for the first time established as the conflicts law of the District of Columbia the "newer and more realistic judicial approach" to conflict of laws problems — i.e., that the choice of law to be applied to each legal issue presented is to be made in light of the jurisdiction which has the strongest interest in the resolution of that issue," thereby applying "the law of the place which has the most significant contacts with the matter in dispute." See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526; *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279; *Richards v. United States*, 369 U.S. 1.

By application of this new "contacts" theory of conflicts law, the Court of Appeals concluded that the District of Columbia's "connection with the occurrence and with the parties, and its interest in the resolution of the issue before us, are, if not wholly remote, certainly less than Brazil's" and hence the Brazilian law limiting a wrongful death recovery to $170 American dollars should be applied. The court emphasized the fact, in assessing the relative interests of Brazil and the District, that neither petitioner nor her decedent are or were residents of or domiciled in the District of Columbia and that petitioner and her children accordingly could never become public

charges on the District relief rolls. And the respondent Varig Airlines was said to be subject to suit in the District only because of its international operations, which gave rise to its operation of a ticket office in the District. In short, said the court, "the only relationship of the District of Columbia to this claim is that it provides a forum with jurisdiction over" Varig Airlines.

Brazil, on the other hand, was not only the scene of the accident but has a national policy protective of Brazilian corporations like Varig Airlines. In the court's view, which was not related to any fact of record, the success of the Varig enterprise "is a matter not only of pride and commercial well-being, but perhaps even of national security" from Brazil's standpoint. The court added that the Brazilian Code of the Air, which contains the limitation in question, was enacted in 1938 "with a view toward protecting what was then, and still is, an infant industry of extraordinary public and national importance." And the court felt that the inflationary drop in the value of the cruzeiro should not be deemed to render obsolete Brazil's legitimate concern in limiting recoveries against her airlines.[6]

As indicated, the prime element in the court's mind that deprived the District of any substantial interest in the issue of recoverable damages was the fact that neither petitioner nor her deceased husband was resident or domiciled in the District. But, said the court, the fact that they were resident in Maryland made Maryland's "interest in the matter of appellant's [petitioner's] recovery

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[6] In 1938, when the Brazilian Code of the Air was enacted, the value of 100,000 cruzeiros in American dollars was approximately $6000. In 1963, at the time of the judgment entered in this case by the District Court, the value had dropped to $170. In 1964, at the time of the oral argument before the Court of Appeals, the value had declined to about $62.50. At the present time (December, 1965) the value has descended still further to about $46.30. See Wall Street Journal, Foreign Exchange Prices, December 28, 1965, p. 16, col. 4.

. . . not insignificant, for it is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall in the first instance." The court thus felt it necessary to strike a balance between the law of Maryland and the law of Brazil.

In striking that balance, the court below gave the same weight to Brazil's interests as it had done in comparing them with the District's interests. But in assessing the "not insignificant" interests of Maryland, stemming from petitioner's residence, the court simply concluded that "a Maryland court would not have ignored the Brazilian limitation on recovery if this action had been brought there originally." In other words, Maryland's interest was translated into terms of the supposed Maryland conflicts rule rather than in terms of Maryland's substantive law of damages for wrongful death (see Art. 67, § 4, Ann. Code of Md. (1957), which permits unlimited recovery).

Because the issue and the implications of the applicability of the Maryland law had not been briefed or argued by the parties, as the court conceded, petitioner felt impelled to file a petition for rehearing *en banc*, particularly in view of the serious constitutional problems ensuing from the court's distinctions between residence in Maryland and residence in the District of Columbia. The petition for rehearing was the first time petitioner had an opportunity to present these problems to the court below, these problems having been created by the unexpected ruling. It was a ruling that the litigants could not reasonably have anticipated from prior decisions and thus they had no prior chance to consider or analyze the matters involved in the court's decision on this point. See *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-678; *Herndon v. Georgia*, 295 U.S. 441; Stern and Gressman, Supreme Court Practice (3d ed. 1962), p. 99.

The petition for rehearing *en banc* was summarily denied by the court, Circuit Judge J. Skelly Wright noting that he would have granted the petition. In that petition,

petitioner presented the following federal constitutional questions:

(1) Does the petitioner, as a Maryland resident, have a right under the Privileges and Immunities Clause, Art. IV, § 2, to bring suit in the District of Columbia for a foreign wrongful death and to obtain the same benefit of the unlimited recovery policy as would be accorded a District plaintiff?

(2) Does the petitioner have a right under the Equal Protection Clause of the Fourteenth Amendment, as applied to the District of Columbia, to equality of treatment in this case with a District plaintiff?

(3) Does the Full Faith and Credit Clause require recognition and application of Maryland's unlimited recovery statute and is petitioner denied due process of law under the Fifth Amendment by the failure of the Court of Appeals to recognize and apply that statute?

REASONS FOR GRANTING THE WRIT

As the court below noted, this case "presents an international variant of a recurring domestic conflict of laws problem, namely, the applicability in the forum (the District of Columbia) of a monetary damage limitation contained in the wrongful death statute of the place of injury (Brazil)."[7] At the same time, this "international variant"

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[7] The recurring nature of the domestic aspects of this conflict of laws problem, in the context of airplane accidents, is illustrated by such cases as *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526; *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (C.A. 2), cert. denied, 372 U.S. 912; *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796; *Goranson v. Capital Airlines, Inc.*, 345 F.2d 750 (C.A. 6), now pending on petition for certiorari, No. 757, Oct. Term, 1965; *Skahill v. Capital Airlines, Inc.*, 234 F. Supp. 906 (S.D.N.Y.) aff'd per curiam by C.A. 2, cert. denied, 382 U.S. 878; *Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D.N.Y.). See also *Van Dusen v. Barrack*, 376 U.S. 612.

(*Continued, next page*)

has created problems of federal law and of constitutional law that distinguish it from all previous cases of this general nature. So important are those problems as to warrant the grant of certiorari.

1. The decision below raises important questions as to the applicablity of federal law in determining the damages recoverable in a District of Columbia court for the wrongful death in Brazil of an American serviceman stationed in the District of Columbia.

The court below had unquestioned authority to adopt, as the conflicts law of the District of Columbia, the choice-of-law rule that takes "into account the interests of the State having significant contact with the parties to the litigation." *Richards v. United States*, 369 U.S. 1, 12; and see *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 547-548. And it is this Court's policy normally not to interfere with local rules of law fashioned by the courts of the District of Columbia. *Miller v. United States*, 357 U.S. 301, 306.

But the nature of the decision below transcends those considerations. In making its otherwise allowable assessment of the interests of Brazil and the District in the amount of damages recoverable in this case, the court below has completely ignored the national or federal interest at stake. The unconscionable result is to limit the recovery by survivors of an American serviceman to a mere pittance of $170, thereby imposing upon some American jurisdiction the burden of supporting those survivors should they ever become public charges.

(*Footnote* 7, *continued*)

A similar "international variant" of the problem, involving the applicability of the Brazilian limitation in a suit brought in a federal court in New York, is pending before the Second Circuit on appeal from *Ciprari v. Servicos Aereos Cruzeiro*, 245 F.Supp. 819 (S.D.N.Y.).

That there is a national concern in the outcome of this case, a concern that overrides the Brazilian interest in limiting the liability of its airline corporations and that justifies the invocation of an unlimited recovery rule as a matter of federal law, would seem clear from the following considerations:

(1) In the international setting of this case, involving the wrongful deaths of American servicemen while on duty in a foreign land, the United States has a clear interest in securing adequate compensation for those financially injured by the wrongful deaths. A major purpose of any wrongful death cause of action — and there is no reason for supposing that the Brazilian Code cause of action is any different in this respect — is to compensate "certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death." *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 69. And it is the domicile of the decedent and his next of kin, as the court below seemed to indicate, that has the prime interest in securing such compensation, for it is the place of domicile rather than the place of injury that must bear the potential burden of support should adequate compensation not be forthcoming.

The place of domicile, in terms of American servicemen killed in a foreign country, may fairly be termed that of the United States. Is it not in the national interest to provide uniform treatment to the survivors of all such servicemen? Why should any state or jurisdiction within the United States be forced to support the survivors of these servicemen? So far as their domicile or residence in any of the American states is concerned, "what difference can it make where they may reside?" *McGovern v. Philadelphia & R.R. Co.*, 235 U.S. 389, 400. In the words of the Court in the *McGovern* case, at 400, "It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed."

(2) The stress placed by the court below on the supposed fact that petitioner is a resident of Maryland [8] and that the District of Columbia thus has no concern whatever for her welfare misses the whole nature of the real competing interests. The question is whether, in an international tort of this nature, the United States or Brazil has the greater concern with the amounts recoverable by the American survivors of American servicemen. If it be concluded that the place of residence or domicile — to wit, the United States — has the greater interest, the particular state or jurisdiction within our shores wherein the survivors currently reside becomes of little if any significance, save perhaps in terms of the maximum damage recovery. In this case, since neither the District nor Maryland has any limit on the amount recoverable, the residential factor becomes totally irrelevant.

Indeed, the District of Columbia may fairly be said to represent the national concern with the welfare of survivors of those American servicemen killed abroad who were stationed in the District. The District, as the home of the Federal Government, has a continuing and close relationship to federal employees working in the District and residing in surrounding Maryland and Virginia suburbs — as was true in this case. See *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 476. And that interest is not lessened by the fact that the survivors, subsequent to the wrongful death of such employees, may move to other jurisdictions. Modern metropolitan mobility does not lend itself to static domicile.

The fact that domicile is so frequently fluid in nature serves to emphasize the reality of the national concern

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[8] The unreality of such stress is emphasized by the fact, though it is not of record, that petitioner is now a resident of New York. The Maryland address given in the caption of the complaint was true as of the time the suit was filed in 1962, but petitioner has since moved. The current burden of supporting her, should she become a public charge, would be on New York, not Maryland.

with the substantiality of compensation for those harmed by the wrongful death of servicemen serving abroad. In these circumstances it ill-behooves the District to refuse a meaningful recovery to the survivors of a serviceman stationed in the District on the theory that the relief rolls of a suburban Maryland community rather than those of the District should or will bear the ultimate burden.

(3) Underlying the national concern with the recoverable damages in this international tort is the fact that the application of the Brazilian rule of damages means an absurdly low maximum recovery. The Brazilian maximum of 100,000 cruzeiros, as the judgment below indicates, results in an unjust limitation of $170 in American coin.

No American state pretends to impose such a *de minimis* limitation on wrongful death recoveries. Of the 50 states in the union, 37 have no limitation whatever — nor has the District of Columbia. Of the other 13 states, none has a limitation of less than $10,000.[9] Even under international air tort standards, the $170 limitation is irrational. The Warsaw Convention, to which both the United States and Brazil were signatories, makes the maximum amount recoverable for the death of an aircraft passenger $8,292; and the United States has yet to ratify the more recent Hague Protocol, which doubles the Warsaw limitation to $16,584. The State Department, reflecting the American viewpoint that the maximum, if any, should

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[9] It is noted by Kreindler, Aviation Accident Law, Vol. 1, §11.01[4], p. 345 (1963) that:

> "Thirteen states do have maximum limitations of damages for wrongful death, however, (Colorado — $25,000; Illinois — $30,000; Kansas — $25,000; Maine — $20,000; Massachusetts — $20,000; Minnesota — $25,000; Missouri — $25,000; New Hampshire — $10,000 - $25,000; Oregon — $20,000; South Dakota — $20,000; Virginia — $30,000; West Virginia — $20,000; and Wisconsin — $20,000). The number has decreased in recent years, and the limitations have increased. No states limit liability for personal injury."

be no less than $100,000, has sought denunciation of the Warsaw Convention and disapproval of the Hague Protocol. And the state law limitations that remain have been labeled by the New York Court of Appeals as "unfair," "anachronistic," "absurd," and "unjust." *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 39, 172 N.E.2d 527.[10]

The utter absurdity of a $170 limitation on recovery for a wrongful death, "the supreme personal injury," *American Stevedores v. Porello*, 330 U.S. 446, 460, is too obvious to require elaboration. When the Brazilian Code of the Air was enacted in 1938, the value of the 100,000 cruzeiro limitation approximated $6,000. Inflation and the vagaries of foreign exchange rates reduced that value to $170 at the time of the judgment below — and to less than $50 at present.

To insist upon imposing the $170 limitation in the interest of protecting the airline industry of Brazil, at the expense of the American survivors of American servicemen, is consistent with no rational notion of international comity. There is no evidence whatever that Brazil contemplated or intended to limit the liability of its airlines to $170 per human life, or that Brazil foresaw that such a low limit would be applied in an international tort situation so as to make meaningless any possible recovery by American beneficiaries. By any American standard, be it state law, federal law or treaty, a $170 limitation cannot be recognized as consistent with the public policies attaching to wrongful death actions.

The need for the recognition of the federal interest in

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[10] "The imposition of a maximum limitation of damages represents a departure from ordinary American tort principles. The very essence of our tort law, based as it is upon fault, lies in the concept of the tortfeasor bearing the responsibility and the cost of damage ... in wrongful death cases, our law and our courts attempt to measure the precise amount of pecuniary loss sustained by the surviving beneficaries." Kreindler, Aviation Accident Law, Vol. 1, § 11.01[4], pp. 344-345 (1963).

determining the relative merit of the conflicting interests in this case seems plain. It is that national interest that is at stake here, an interest that must be recognized and applied as a matter of federal law. The importance of the problem is such as to warrant full review by this Court. As air travel continues to grow apace, the problem will recur again and again until a definitive resolution has been supplied.

2. The decision below raises important questions as to the constitutional validity of a discriminatory choice-of-law rule which precludes any meaningful recovery solely because of the plaintiff's residence outside the forum.

The inevitable consequence of the failure of the court below to recognize and apply federal law in assessing the federal interests at stake in this international tort has been the creation of unrealistic, discriminatory and unconstitutional distinctions as between plaintiffs, premised on their residence or non-residence within the District of Columbia.

In disregard of the fact that in this setting the particular residence of the American survivors of an American serviceman killed abroad should make no difference, the basic thrust of the opinion below gravitates toward the residence or domicile of this particular petitioner. Had she been a resident of the District of Columbia, the opinion clearly indicates that the District's concern with her welfare as a District resident would suffice to overcome Brazil's interest in limiting recovery; she would therefore be entitled to the benefit of the District's unlimited recovery policy. But since she was found to be a Maryland resident — and solely by virtue of that finding — she was held limited to the Brazilian maximum recovery of $170. Whether that Brazilian limitation is applied to her directly or under a "renvoi" theory, petitioner's residence outside the District was held to be the decisive element causing her to lose the benefits of an unlimited recovery policy. Not even Maryland's conceded interest in her

right to a substantial damage recovery was thought to save her from the fate of a $170 recovery limitation.

Important constitutional questions inescapably emerge from such a discriminatory choice-of-law ruling:

1. Does the petitioner, as a Maryland resident, have a right under the Privileges and Immunities Clause, Art. IV, § 2, to bring suit in the District of Columbia for a foreign wrongful death and to obtain the same benefit of the unlimited recovery policy as would be accorded a District plaintiff?

This Court has held that a state may not, consistently with the Constitution, arbitrarily close the doors of its courts to actions for wrongful deaths occurring in another state. *Hughes v. Fetter*, 341 U.S. 609; *First National Bank v. United Air Lines*, 342 U.S. 396. And, having opened the doors of its courts to such actions, a state may not then condition the access on discriminatory terms as between residents and non-residents of the forum.

This latter principle, which is at stake here, was most pertinently recognized nearly sixty years ago in *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142. In that case, a Pennsylvania resident brought an action in an Ohio court for the wrongful death of her husband in Pennsylvania. An Ohio statute authorized such an action for a foreign wrongful death only when the death was that of a citizen of Ohio. The Court, viewing the statute as making no discrimination based on the residence of the plaintiff to the suit (as distinguished from the residence of the deceased), affirmed the dismissal of the suit. Mr. Justice Harlan and two others dissented.

The majority in *Chambers*, however, recognized certain fundamental propositions under the Privileges and Immunities Clause (207 U.S. at 148-149):

> ". . . subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of

> the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies, at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Mr. Justice Harlan's dissent, while viewing the impact of the Ohio statute differently than the majority, expressed much the same constitutional views (207 U.S. at 154-155):

> "It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that state, take cognizance of an action for damages on account of death occurring in another state and caused by wrongful act, neglect, or default, except where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed by its statute against any suit for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the state where the death occurred the widow or estate of each decedent would have, in the latter state, a valid cause of action.
>
> "Is a state enactment having such effect repugnant to the clause of the Federal Constitution, art. 4, § 2, which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states?' Will not that constitutional guaranty be shorn of much of its

> value if any state can reserve, either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other states?"

The applicability of the foregoing principles to this case seems plain. The District of Columbia, having opened the door of its courts to suits for wrongful death occurring in Brazil and other foreign jurisdictions, has in this instance closed the door to all meaningful relief to a non-resident plaintiff solely because she is a non-resident. The privilege of securing an unlimited amount of recovery has been accorded only to those plaintiffs who reside in the District and for whom the District has a paternal concern. But because the District has no such concern for a non-resident, that plaintiff is barred from any meaningful recovery. The recovery allowable such a plaintiff — $170 — is too miniscule to qualify as a meaningful recovery; for all practical purposes, the door of the District of Columbia court has been shut on this petitioner.

That door to effective relief having been shut solely because petitioner is a non-District resident, the principles of the Privileges and Immunities Clause come into operation.[11] To be sure, the District is free to adopt a choice of law doctrine which weighs the residence of the plaintiff as one of the factors in assessing the contacts of the forum with the matter in issue. And in given situations, the residential factor may be decisive in resolving the prevailing contact. But in this case the court has

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[11] While that clause technically may not be applicable to the District, the principles therein established must be considered binding upon a District of Columbia court dealing with non-resident plaintiffs. Cf. *Bolling v. Sharpe*, 347 U.S. 497, 500 ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

made residence not only the decisive factor vis-a-vis the interest of Brazil in limiting the liability of its airlines but also the sole and decisive factor as between the plaintiffs entitled to take advantage of an unlimited recovery policy and thus avoid the Brazilian limitation. And it has done so in circumstances where the home state of the non-forum plaintiff (Maryland) has an unlimited liability policy identical to that of the forum (the District) and where by use of the "renvoi" doctrine the home state's policy is made inapplicable. The sum total of these rulings is to preclude any kind of effective relief to this petitioner solely because she is a non-District resident, while allowing a District resident to secure a recovery unbounded by the Brazilian limitation.

Petitioner does not take the position that she has an unqualified constitutional right to the benefits of the District's wrongful death recovery policy. What she does claim is a right under the Privileges and Immunities Clause not to be denied effective access to the District of Columbia courts and to effective relief therein — where the sole and decisive reason therefor is her non-District residence. The unconstitutional discrimination with respect to the effective access of the District of Columbia courts is, in petitioner's view, between two types of plaintiffs:

(1) The District resident, whose residency in the District would give the District sufficient contact with the recovery issue to permit recognition of the District's unlimited recovery policy; and

(2) The non-District plaintiff who resides in a state where such residency would constitute a sufficient contact with the recovery issue to permit recognition of that state's unlimited recovery policy, a policy identical with that of the District.

In these circumstances, to permit unlimited recovery only to the District plaintiff and to confine the non-District plaintiff to a *de minimis* recovery is to effectuate a

gross and unwarranted discrimination. The Privileges and Immunities Clause of course permits disparity of treatment as between residents and non-residents "where there are perfectly valid independent reasons for it." *Toomer v. Witsell*, 334 U.S. 385, 396; and see *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387. But no such "valid independent reasons" are here apparent. No concept of choice of law or notion of renvoi can justify the disparity effectuated here between a District plaintiff and this Maryland plaintiff.

2. Does the petitioner have a right under the Equal Protection Clause of the Fourteenth Amendment, as applied to the District of Columbia, to equality of treatment in this case with a District plaintiff?

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," a principle which applies with equal force to the District of Columbia. See *Bolling v. Sharpe*, 347 U.S. 497. And a foreign suitor in the courts of a state for purposes of litigation is clearly a "person within its jurisdiction" so as to be entitled to the equal protection of the laws. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550. Thus the petitioner, as a foreign suitor permitted to sue in the District of Columbia courts on a foreign wrongful death action, was entitled to the equal protection of the District's laws in the course of processing that action.

For the same reasons set forth with respect to the Privileges and Immunities Clause claim, the discrimination here created as to the petitioner because of her non-District residence would appear to violate the principles of the Equal Protection Clause. The nub of this Clause is an insistence upon reasonableness in any discrimination or classification established by a state. But something more than a classification in terms of residence is needed to satisfy that requirement. It is not

enough that such a classification coincides with a state's interest in applying its own laws to its own residents or opening its doors to effective relief for its own residents, thereby reflecting a lack of concern with the welfare of an out-of-state suitor. See Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. Chi. L. Rev. 1 (1960).

In short, the residence *per se* of a party plaintiff cannot be recognized as a reasonable basis for classifying who shall receive the benefits of any legal policies of a state — at least where the right to bring suit is unrelated to one's residence. Yet, as has been indicated, petitioner has been denied the benefits of an unlimited recovery policy solely because of her non-District residence. That this discrimination was effected through the process of a choice-of-law doctrine does not make the discrimination any less real or the constitutional problem any less substantial.

This constitutional problem obviously deserves the full attention and consideration of this Court.

3. Does the Full Faith and Credit Clause require recognition and application of Maryland's unlimited recovery statute and is the petitioner denied due process of law under the Fifth Amendment by the court's failure to recognize and apply that statute?

The court below has held that the District of Columbia has no legitimate interest or contact with the accident or with the issue of recoverable damages. It apparently views the matter solely as one to which Brazil and Maryland have competing claims, the Maryland one being of a "not insubstantial" nature due to the residence therein of the petitioner and her late husband. The court seemingly indicates that this Maryland interest or contact is sufficient enough to overcome the Brazilian interest; otherwise the court's extensive search into the Maryland law would be meaningless.

Maryland, of course, has a provision in its wrongful death statute permitting recovery without limitation. Art. 67, § 4 (Ann. Code of Md., 1957). That provision would be the pertinent one to reflect Maryland's conceded interest in the matter here involved. Yet through the use of the renvoi doctrine, by which the Maryland conflicts rule rather than the Maryland law of damages, was applied, that provision is ignored and its benefits made unavailable to the petitioner.[12]

Thus the District of Columbia, which is said to have no interest in the matter, has applied its choice of law doctrine so as to exclude the one provision of Maryland law that mirrors Maryland's prevailing contact. And when the disinterested forum applies its conflicts law in such a way as to defeat substantial rights available under a pertinent law of another state, there is a denial of due process in the constitutional sense. *Home Ins. Co. v. Dick*, 281 U.S. 397. As the Court said in the *Dick* case, p. 410, the forum state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

The substantiality of the due process rights of the petitioner that have been abrogated is not to be denied. The failure to permit petitioner to secure the benefits of § 4 of the Maryland wrongful death statute means that she is denied all opportunity for meaningful relief against Varig Airlines, being confined to a maximum recovery of $170.

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[12] Under the normal "contacts" theory of choice-of-law, the substantive law of the jurisdiction having the closest contact with the matter in question is selected and applied by the forum court. See Restatement (Second), Conflict of Laws (Tent. Draft No. 9, 1964), §379 and comments thereon. But the court below chose not the Maryland substantive rule of damages but the Maryland conflicts rule, holding that had the suit been brought in Maryland the Brazilian limitation would have been applied. This is a classic example of the "renvoi" doctrine in operation, a doctrine that is foreign to the "contacts" choice-of-law principle.

Thus petitioner and others in her position are left remediless and put in danger of becoming public charges of Maryland — "both matters of grave concern to the state." *Alaska Packers Assoc. v. Industrial Accident Comm.*, 294 U.S. 532, 542.

By the same token, the District's refusal to apply the Maryland provision of law relating to damage recoveries for wrongful death would seem, in these circumstances, to violate the basic purpose of the Full Faith and Credit Clause. By the court's ruling, the District has no interest, no statute or no policy at stake here. Its sole concern is to assess the contacts as between Brazil and Maryland and to give full faith and credit to the relevant statute reflecting the prevailing contact or interest. And if Maryland's interest prevails, the relevant Maryland statute would become controlling by force of the Full Faith and Credit Clause. *Hughes v. Fetter*, 341 U.S. 609.

Thus is put in bold relief not only the incongruity and inequity of the use of the renvoi doctrine in this case but also the constitutional invalidity of such a resort to the doctrine. If the renvoi doctrine results in the denial to the litigant of the right to a substantial recovery which the substantive law of the state of his residence would give him, then the renvoi doctrine must be constitutionally suspect under the Due Process Clause. And if the renvoi concept is used to deny recognition of an otherwise pertinent substantive law of the state of plaintiff's residence, it must also be suspect under the Full Faith and Credit Clause. These are matters that plainly deserve the full consideration of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,277

BEATRICE ANTONETTE TRAMONTANA, APPELLANT

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE,
a Brazilian Corporation,
t/a VARIG AIRLINES, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 10, 1965

Mr. Eugene Gressman, with whom *Messrs. Hyman Smollar, Ronald Rosenberg* and *George Kaufmann* were on the brief, for appellant.

Mr. John L. Laskey, with whom *Mr. Harry A. Bowen* was on the brief, for appellee.

Before FAHY, DANAHER and MCGOWAN, *Circuit Judges*.

MCGOWAN, *Circuit Judge:* This appeal presents an international variant of a recurring domestic conflict of laws problem, namely, the applicability in the forum (the District of Columbia) of a monetary damage limitation con-

tained in the wrongful death statute of the place of injury (Brazil). We have, thus, no concern with the Full Faith and Credit Clause of the Constitution, nor is it claimed that any international engagement of the United States compels recognition of the foreign law. On the record before us, however, we do not find that the District Court erred in according such recognition; and we affirm its judgment.

I

Vincent Tramontana was killed on February 26, 1960, when the United States Navy airplane in which he was traveling on naval orders collided over Rio de Janeiro, Brazil, with an airplane owned and operated by a Brazilian airline.[1] At the time of his death, Tramontana was a member of the United States Navy Band, which was on an official tour of Latin America. The record does not show his permanent duty station, but he resided with his wife, appellant here, in Hyattsville, Maryland. The Navy plane in which he was travelling when he was killed was *en route* from Buenos Aires in Argentina to Galeao, Brazil. Appellee Varig Airlines is a Brazilian corporation having its principal place of business in Brazil but carrying on its transportation activities in many parts of the world, including the United States. The Brazilian plane was on a regularly scheduled commercial flight from Campos, Brazil, to Rio de Janeiro when the accident occurred.

Almost two years after her husband's death, appellant

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[1] The Brazilian plane was, at the time of the accident, owned and operated by Real S. E. Transportes Aeros, a Brazilian corporation, appellee's assignor. Appellee, however, does not contest its status as Real's successor in interest or otherwise disclaim liability on this ground. For convenience, appellee is sometimes referred to hereinafter as the owner and operator of the plane at the time of the collision.

instituted this action in the District Court against Varig and its predecessor, alleging that negligence in the operation of the Brazilian plane had caused her husband's death. She explicitly based her claim for recovery on certain provisions of the Brazilian Code of the Air which provide a cause of action for injury or death resulting from negligent operation of aircraft in Brazil. She claimed damages of $250,000. Service was made on Varig Airlines, which concededly is subject to suit in the District of Columbia.[2] Varig filed an answer to appellant's amended complaint and the same day moved for summary judgment dismissing the complaint or, in the alternative, for summary judgment in respect of so much of appellant's claim as exceeded the U. S. dollar equivalent of 100,000 Brazilian cruzeirós. Varig relied on Article 102 of the Brazilian Code, which limits liability for injury or death in aviation accidents to that amount. The District Court, with Varig's consent, entered judgment in favor of appellant in the amount of $170.00, the current dollar value of 100,000 cruzeiros. It awarded judgment in favor of Varig "for all of the plaintiff's claim which exceeds the sum of One Hundred Seventy Dollars ($170.00)." From this latter judgment Mrs. Tramontana appealed.[3]

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[2] Appellant based jurisdiction on 11 D.C. Code § 306, now, in amended version, 11 D.C. Code § 521(a), which conferred on the United States District Court for the District of Columbia jurisdiction of "all cases in law and equity between parties, both or either of which shall be resident or be found within said district." Service of process upon Real was quashed on the ground that that company was not doing business within the District of Columbia. See 13 D.C. Code § 334 (a), formerly 13 D.C. Code § 103.

[3] Seventeen other members of the Navy Band perished in the collision. They are represented in two other actions in the District Court, one involving eleven plaintiffs, the other, six. Appellee had summary judgment on the same terms in

II

The only question now before us is whether Brazil's limitation on the damages recoverable for death sustained in airplane accidents occurring there is to be applied in this suit in the District of Columbia. Appellant appears to concede that her cause of action, if any, was created by, and arises under, a provision of Brazilian law enacted coincidentally and in conjunction with the damage limitation. She argues, however, that the forum law regarding damages for wrongful death occurring in the District of Columbia, *ie.*, unlimited recovery, should govern that aspect

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both suits. Only appellant has appealed. The other two cases have been ordered "stetted pending final disposition of any appeal taken in the case of Beatrice Antonette Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig Airlines, Civil Action No. 637-62 in this Court, counsel having stipulated that the final ruling in said case will be controlling herein." Of the seventeen other plaintiffs in these two suits, two, and perhaps three, were listed as residents of the District of Columbia, eight as residents of Maryland, and the remainder as residents of other states. We, of course, decide only the case before us, which involves a non-resident appellant suing in respect of the death of a non-resident decedent. A tactical decision by counsel to stipulate that the result of this appeal shall apply in cases not on appeal does not enlarge the record before us.

After this appeal was heard, the Court of Claims of the United States, pursuant to a reference by Congress, recommended an award of $25,000 to the families of each of these eighteen decedents. *Armiger* v. *United States*, 339 F.2d 625 (Ct.Cl. 1964). This recommendation was founded on purely equitable grounds, and rested upon the circumstance that, prior to the fatal flight, there had been a failure to follow the usual practice of distributing application forms for private flight insurance. The possibility of suit against the United States under the Federal Tort Claims Act is precluded by that statute's express exclusion of claims "arising in a foreign country." 28 U.S.C. § 2680(k).

of her claim. Initially, she accepts the applicability of the traditional conflict of laws rule in personal injury cases that the *lex locus delicti*, the law of the place where the injury occurred, generally governs in a suit brought elsewhere, but she asserts that a court sitting in the District of Columbia should adopt the familiar exception to the effect that the forum will refuse to apply the otherwise applicable foreign law if it is contrary to some strong public policy of the forum. Appellant asserts the existence of a strong policy of the District of Columbia in favor of unlimited recovery for wrongful death, which she claims is evidenced by Congress' repeal in 1948 of the $10,000 maximum until then contained in the local wrongful death statute.[4] She points also the fact that only thirteen states still limit recovery for wrongful death, and that none imposes a ceiling as low as that contained in the Brazilian

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[4] 16 D.C. Code § 2701 was amended in 1948, 62 Stat. 487, eliminating the $10,000 ceiling on damages recoverable for wrongful death. As amended, it provides in relevant part:

> When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is a married woman, entitle her husband, either separately or by joining with his wife, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, notwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.
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> The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. . . .

Air Code. She cites the Warsaw Convention, which governs generally accidents involving international air carriers and which now permits recovery up to $8,292, as constituting in essence an international standard of fairness in such matters.[5] And, finally, she relies on the New York Court of Appeals decision in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), as a persuasive precedent for the position she urges us to adopt. Another contention, which we treat separately hereinafter, is that the Brazilian limitation should be disregarded because of the striking decline which has taken place in the value of the cruzeiro in terms of the dollar.

Appellant's essential effort throughout is to urge us to follow the "newer and more realistic judicial approach" to conflict of laws problems exemplified by *Kilberg* and *Babcock* v. *Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), and more recent decisions of the Supreme Court, and to reject the assertedly outmoded and discredited teaching of *Slater* v. *Mexican Nat'l R.R.*, 194 U.S. 120 (1904), and kindred decisions. Under the test we are asked to employ, "the choice of law to be applied to each legal issue presented is to be made in light of the jurisdiction which has the strongest interest in the resolution of that issue." Appellant's Brief, p. 10. "Emphasis is [to be] placed . . . upon the law of the place which has the most significant contacts with the matter in dispute." *Id.* at 26. A cornerstone of this newer thinking, appellant contends, is the forum's reluctance to subordinate its policies to those of another state when its own interest in the case is real and substantial.

The Supreme Court, in its decisions in *Richards* v.

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[5] Both Brazil and the United States are signatories to the Convention, but its coverage is limited in terms to claims by or on behalf of passengers of the carrier against which recovery is sought.

United States, 369 U.S. 1 (1962), and many earlier cases,[6] has recognized the inadequacies of the theoretical underpinnings of *Slater* and its progeny. The latter cases have a highly attenuated precedential weight, both in authority and reason.[7] Thus we are free to explore the question presented by this appeal in the light of the newer concepts of conflict of laws. Our conclusion that the District Court properly applied the Brazilian limitation rests upon an examination of the respective relationships of Brazil and the District of Columbia with the accident, and with the parties here involved; and a consideration of their respective interests in the resolution of this issue.

The interest underlying the application of Brazilian law seems to us to outweigh any interest of the District of Columbia. Not only is Brazil the scene of the fatal collision, but Varig is a Brazilian corporation which, as a national airline, is an object of concern in terms of national policy. To Brazil, the success of this enterprise is a matter not only of pride and commercial well-being, but perhaps even of national security. The limitation on recovery against airlines operating in Brazil was enacted in the

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[6] *E.g.*, *Watson* v. *Employers Liability Assur. Corp.*, 348 U.S. 66, 72 (1954); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 160-62 (1946); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935). See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U.CHI.L. REV. 9, 75-84 (1958).

[7] See, *e.g.*, *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1963); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1945); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468, 474 *et seq.* (1928).

early days of commercial aviation,[8] no doubt with a view toward protecting what was then, and still is, an infant industry of extraordinary public and national importance. The Brazilian limitation in terms applies only to airplane accidents, unlike the Massachusetts provision rejected in *Kilberg*, which was an across-the-board ceiling on recovery for wrongful death in that state. The focus of Brazilian concern could hardly be clearer.

We have seen nothing that would suggest that Brazil's concern for the financial integrity of her local airlines should be deemed to be less genuine now than when Article 102 was enacted, simply because of the depreciation of the cruzeiro. The failure to amend that provision may reflect a conscious desire to avoid enlarging the potential liability of local airlines during a period of general economic difficulty. It may represent an unwillingness to contribute to the inflationary spiral by adjusting "prices" fixed by statute, which the government can control. Or it may be attributable in part to both motives. In any event, we are not persuaded that the fact of inflation itself—with the result that 100,000 cruzeiros are worth now considerably less than when the limitation was enacted—should be deemed to render obsolete Brazil's legitimate interest in limiting recoveries against her airlines.

Appellant relies primarily on the New York Court of Appeals decision in *Kilberg* v. *Northeast Airlines, Inc.*, *supra*, as a precedent for the course she asks us to follow. A close analysis of that court's reasoning reveals that the relationships and interests, which it thought compelled the result reached, do not parallel those here. The decedent in

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[8] The Brazilian Code of the Air, including Article 102, was enacted in 1938. Air transportation has become increasingly important in Brazil, both because of the size of the country, and because of the relative inadequacy of surface transportation.

Kilberg was both a resident and a domiciliary of New York. He was a paying passenger on the defendant airline, which relationship had originated in New York. As the Court of Appeals pointed out, once on board the plane the place of the injury was merely "fortuitous." New York's long-standing policy in favor of unlimited recovery in actions for wrongful death coalesced in this case with its real and immediate interest in providing full compensation for the death of one of its own citizens. And its interest would have been the same whether the defendant's aircraft had crashed in New York, in Long Island Sound, or, as it did, in Massachusetts.

In the case before us neither appellant, her children, nor her husband were or are resident or domiciled in the District of Columbia. Vincent Tramontana was not a passenger on appellee's plane, and his "relationship" with appellee commenced and ended in Brazil in one shattering moment. The place of injury, under these circumstances, was clearly not fortuitous, although the accident was something of a freak. Vincent Tramontana could not have been killed by Varig's Campos-to-Rio flight except in Brazil. To suggest that he might have been killed here in the District, or in Maryland, by one of Varig's international flights is to ignore the facts of this case.[9] It is one thing

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[9] The possible locations of Varig's wrongdoing, if such it was, are irrelevant to the determination of which law should measure appellant's recovery except insofar as they have some other connection with the parties or the accident, or some independent interest in the resolution of this isue. If the mere possibility, however remote, that Vincent Tramontana might have been killed through some negligence of appellee in the District of Columbia were thought to give the District some interest in the application of its law, whatever predictability remains in the conflict of laws of torts would disappear. Concededly, predictability is a depreciated coin in tort law, see *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 478, 191 N.E. 2d 279, 281, 240 N.Y.S. 2d 743, 746-47 (1963), but it

to say that airlines should not be the beneficiaries, nor their passengers the victims, of the vagaries of weather and faulty equipment that cause an aircraft to crash in one jurisdiction rather than another. It is quite another to say that an American traveler, who is injured in Brazil through the negligence of the operator of a local airline on which he was not a passenger and with which he had no previous connection, is entitled to the benefit of the law of a forum which is not his home, because its successor happens to do business there.[10]

The District of Columbia's connection with the occurrence and with the parties, and its interest in the resolution of the issue before us, are, if not wholly remote, cer-

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still retains some value. Varig's ability to predict and obtain the cost of insurance, for example, may depend to some extent on its ability to estimate its potential liability. Compare EHRENZWEIG, CONFLICT OF LAWS, § 213, at 555 (1962).

[10] The presentation to us of this appeal by both parties was depressingly devoted almost entirely to a discussion of the merits of *Kilberg*. Actually, the resemblance of this case to *Kilberg* begins and ends with the circumstance that death in each case occurred while in flight. Decision of this case involves a great deal more than measuring one's respect for the memory of Professor Beale by means of one's attitude towards *Kilberg*. The case before us is much the same as if a resident of the State of Maryland, while on a summer vacation trip to Europe and while crossing the street in Amsterdam, were run over and killed by a beer truck making a local delivery. If Holland had a wrongful death act with a limitation on damages, and if the brewing company had a sales office in the District of Columbia, then a suit in the District by the Maryland widow would present us with a problem virtually identical with that we now have. The increasing international mobility of both ordinary citizens and business enterprises suggests that the issue is an important one already and is likely to become more so. There are obvious implications to be considered in respect of the degree of comity which should obtain between sovereign nations unrestrained by a full faith and credit clause in a world constitution.

tainly less than Brazil's. Neither appellant nor her decedent are or were residents of the District of Columbia. Varig Airlines is subject to suit here only because of the international operations in which it is engaged. Whatever negligence it may have been guilty of assuredly did not occur here, nor, manifestly, did the decedent's death. If appellant and her children should ever become public charges, the burden will rest not on the District of Columbia but on the citizens of Maryland, where appellant resides.[11]

Although Maryland, the state of the decedent's and appellant's residence, might be thought to have a substantial interest in the amount recoverable for his death, no suggestion has been made that we should apply the law of Maryland to determine the issue before us.[12] But this

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[11] The New York Court of Appeals' dominating concern in *Kilberg* was to ensure "protection for *our own State's people* against unfair and anchronistic treatment of the lawsuits which result from these [airline] disasters." 9 N.Y. 2d at 39, 172 N.E. at 527-28, 211 N.Y.S. 2d at 135. The immediate objects of that concern were, of course, the victims and their dependents. The implicit assumption, however, was that if protection were not provided them, the cost of their support might have to be born by the state and citizens of New York. The District of Columbia may have an altruistic interest in seeing that the survivors of residents of nearby states do not go uncompensated, but it faces no additional burden if compensation is not provided.

[12] Neither in her brief nor at the oral argument did appellant urge us to consider any other alternative than the application of District of Columbia law. Her failure to rely, at least in the alternative, on the law of Maryland, the state of her residence as well as that of her husband's, may be at least in part attributable to the fact that at least some of the eighteen plaintiffs appear to reside in states which have damage limitations in their wrongful death acts. It is more likely due to counsel's awareness of what appears hereinafter with respect to the state of Maryland law in this area.

possibility inevitably suggests itself, and we therefore are inclined to say why we think that, even as between the law of Maryland and the law of Brazil, we are without warrant to look to the former. In striking this balance, the weight to be accorded the interests of Brazil remains unchanged. The question is whether Maryland has a significantly greater claim to the application of its law than the District of Columbia. Maryland's only relationship with the parties or the transaction is that it is appellant's residence, and was that of the decedent, but its interest in the matter of appellant's recovery is not insignificant, for it is on the citizens of Maryland that the burden of her support, if she is unable to support herself, is likely to fall in the first instance.[13] Yet it appears likely that a Maryland court would not have ignored the Brazilian limitation on recovery if this action had been brought there originally.

Section 2 of Maryland's wrongful death statute provides that, in suits based on acts committed outside the state,

> the courts of this State shall apply the law of such other state, District of Columbia or territory of the United States, to the facts of the particular case, *as though such foreign law were the law of this State,* provided, however, that the rules of pleading and procedure effective in the court of this State in which the action is pending govern and be so applied as to give effect to the rights and obligations created by and existing under the laws of the foreign jurisdiction in which the wrongful act, neglect or default occurred ....

MD. ANN. CODE, art. 67, §2 (1957). (Emphasis added.) This provision was enacted in 1937 specifically to overrule several Maryland cases refusing to entertain suits for

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[13] As noted above, this burden has, by reason of the action of Congress and the Court of Claims, been assumed to some degree by the citizens of the entire United States.

wrongful death based on foreign wrongful death acts that were "dissimilar" to the Maryland statute.[14] The Maryland courts previously appeared to accept the traditional *lex locus delicti* rule in personal injury cases. The new section, far from changing this allegiance, invested it with statutory authority.[15] It opened the Maryland courts to suits based on a foreign law, regardless of its content, and instructed the courts to give effect to each and every substantive element of that law. The result was to expose Maryland residents to suit at home for acts committed outside the state, with the survivors of Maryland residents killed away from home dependent upon foreign law for any rights of recovery.

The Maryland Court of Appeals has held that, where both accident and death occurred in another state, the defendant's liability—and thus the plaintiff's right to

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[14] See, *e.g.*, *Davis* v. *Ruzicka*, 170 Md. 112, 183 Atl. 569 (1936); *London Guarantee & Acc. Co.* v. *Balgowan S.S. Co.*, 161 Md. 145, 155 Atl. 334 (1931); *Dronenburg* v. *Harris*, 108 Md. 597, 71 Atl. 81 (1908); *Ash* v. *Baltimore & O. R.R.*, 72 Md. 144, 19 Atl. 643 (1890). See also *Kaufmann* v. *Service Trucking Co.*, 139 F. Supp. 1 (D. Md. 1956). Prior to *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), however, the federal courts in Maryland did permit such suits. See, *e.g.*, *Stewart* v. *Baltimore & O. R.R.*, 168 U.S. 445 (1897); *Weissengoff* v. *Davis*, 260 Fed. 16 (4th Cir. 1919); *Rose* v. *Phillips Packing Co.*, 21 F. Supp. 485 (D. Md. 1937).

[15] See *Kaufmann* v. *Service Trucking Co.*, *supra*, note 14, at 5; 50 VA. L. REV. 353, 364 n.51 (1964). While there appear to be no pre-1937 Maryland cases expressly endorsing the *lex locus* rule, neither have we discovered any that disapproved or rejected it. Moreover, the essential premise of the decisions barring suit on dissimilar foreign statutes, see note 14 *supra*, was that the law of the place of injury governed, and in each instance it was that law that the Maryland Court of Appeals refused to enforce. See *London Guarantee & Acc. Co.* v. *Balgowan S.S. Co.*, *supra*, note 14.

recover—depends on the law of that state.[16] It has not had an opportunity to consider whether the amount of damages recoverable is an element of that right, but it is speculative in the extreme for us to infer that it would hold it to be otherwise. The amount of damages recoverable for a tort is, in traditional theory, a matter of substantive law. The New York Court of Appeals, shortly after *Kilberg*, abandoned its position in that case that the measure of damages was governed by New York, and not Massachusetts, law because damage limitations are procedural in nature, and not substantive.[17] The broad language of the Maryland statute, enjoining the courts to give effect to "the rights and obligations created by and existing under the laws of the foreign jurisdiction," suggests strongly that Maryland would enforce a foreign limitation on the damages recoverable for wrongful death. Though Section 2 is in terms applicable only to suits based on the laws of another state, the District of Columbia, or a terri-

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[16] *Wilson* v. *Dailey*, 191 Md. 472, 476, 62 A.2d 284, 285 (1948). See *Kaufmann* v. *Service Trucking Co.*, *supra*, note 14, at 5:

> Sec. 2 clearly indicates that the Maryland legislature intends that the Maryland courts shall apply the substantive law of the jurisdiction where the cause of action arose. This is in accord with the general rule "that all matters pertaining to the substantive right of recovery under a wrongful death statute, including the right to recover, the nature of the right, and the party in whom it is vested, are governed by the law of the state where the injury resulting in death occurred." [Citations omitted.]

See also *King v. Cooper Motor Lines, Inc.*, 142 F. Supp. 405, 406 (D. Md. 1956).

[17] See *Davenport* v. *Webb*, 11 N.Y. 2d 392, 183 N.E. 2d 902, 230 N.Y.S. 2d 17 (1962). See also LEFLAR, CONFLICT OF LAWS, § 65, at 118, § 114, at 220 (1959); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L. J. 1, 5.

tory of the United States, there is no reason for us to suppose that the Maryland courts would refuse to follow the approach it represents when the cause of action arises under the law of a foreign country.[18] And if a Maryland court would not disregard Brazilian law for the benefit of one of its own residents in a suit brought there, why should a court sitting in the District of Columbia do so at the expense of substantial and legitimate interests of Brazil?

Two recent cases support the decision we reach here. *Truath* v. *Northeast Airlines, Inc.*, Civil No. 149-256, S.D. N.Y., grew out of the same accident as *Kilberg*, and it was initially consolidated for trial with *Pearson* v. *Northeast Airlines, Inc.*, 199 F.Supp. 539 (S.D.N.Y. 1961), *aff'd*, 309 F.2d 553 (2d Cir. 1962) (*en banc*), *cert. denied*, 372 U.S. 912 (1963). Both the deceased passenger and his surviving dependents were residents of New Jersey. After the trial judge ruled in *Pearson* that he was bound to follow the New York rule enunciated in *Kilberg*, the plaintiff in *Truath* moved to amend her complaint to allege damages in excess of the Massachusetts limitation. Her motion was denied on the ground that there was no indication that New Jersey would have followed any law except that of the place of the injury. Although this ruling was never appealed because Mrs. Truath's claim was settled prior to trial, it seems to us to represent a correct understanding of the policies that were thought to control in *Kilberg*. New York, whose conflict of laws rule the District Court was obliged to follow,[19] had no interest in enforcing its

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[18] There is no evidence, for example, that Section 2 was intended to implement an obligation, real or imagined, imposed upon the State of Maryland by the Full Faith and Credit Clause of the Constitution. See *Hughes* v. *Fetter*, 341 U.S. 609 (1951).

[19] See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

protective policy where both the deceased and his dependents were non-residents, especially when the state of their residence would not have asserted its own interest if the suit had been brought there. The proper law to apply was that of Massachusetts, "the only state having an interest in the matter."[20]

In *Gore* v. *Northeast Airlines, Inc.*, 222 F.Supp. 50 (S.D. N.Y. 1963), which also arose out of the Nantucket crash, the same District Judge who had presided in *Pearson* and *Truath* denied the plaintiff's motion to strike Northeast's affirmative defense based on the Massachusetts damage limitation. The plaintiff, suing as executor of the deceased who had himself been a New York domiciliary, was a citizen of Maryland and a resident of the District of Columbia. The deceased, like Kilberg and Pearson had purchased his ticket in New York. But his beneficiaries all lived outside New York. His widow and two minor children had taken up residence in Maryland a month after his death. Two adult children, from a prior marriage, at all times relevant resided in California. The District Judge concluded, correctly we think, that New York's protective policy which had been held to govern in *Kilberg* was directed at "the deceased's surviving dependents who are domiciled in New York." He noted that in both *Kilberg* and *Pearson* not only the accident victims but also their sole beneficiaries were New York domiciliaries, both at the time of the accident and at the time of the suit. He further concluded that either California or Maryland would have applied the Massachusetts limitation if the suit had been brought there. In short, in both *Truath* and *Gore* the court found that New York had no interest of its own substantial enough to justify rejection of the Massachusetts limitation

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[20] See Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L. J. 1, 31-32, discussing *Truath* v. *Northeast Airlines, Inc.*, Civil No. 149-256, S.D.N.Y.

when the deceased's beneficiaries resided elsewhere, and that a New York court would not ignore that limitation if the state of their residence would not do so.

Our decision is consistent as well with the most recent formulation of the *Restatement (Second), Conflict of Laws.*[21] Section 379 sets forth the general rule in tort cases as follows:

> (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
>
> (2) Important contacts that the forum will consider in determining the state of most significant relationship include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct occurred,
>
> (c) the domicile, nationality, place of incorporation, and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

This enumeration of significant relationships does not include that of forum *qua* forum.[22] The injury in the case

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[21] RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 9, 1964).

[22] Compare Currie, *The Constitution and the Choice of Law: Governmental Interest and the Judicial Function*, 26 U. CHI. L. REV. 9-10 (1958). Even for those who prefer to start with the fact of the forum and to place the burden of proof on those who would displace its law, such burden can be sustained by a showing of the lack of significant relationships between the forum, on the one hand, and the parties or the event, on the other. See EHRENZWEIG, CONFLICT OF LAWS § 213, at 555 (1962):

> (1) Here, as elsewhere, the law of the forum is the

before us occurred in Brazil, as did appellee's negligent conduct, if it was negligent at all. Vincent Tramontana was an American national, domiciled in Maryland, and so are his widow and children. Varig is a Brazilian corporation, which does business throughout the world. The "relationship" between the parties, if it can be called that, existed fleetingly—and in Brazil. By these criteria, the only state, other than Brazil, with a substantial claim to the application of its law is Maryland, which apparently would apply the Brazilian law in a case brought there. Thus it is that the only relationship of the District of Columbia to this claim is that it provides a forum with jurisdiction over the appellee. That is hardly a reason for the forum to prefer its own notions of policy to those embodied in the Brazilian law which created the claim appellant is asserting.[23]

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starting point. . . . This law will be displaced only if there is a compelling reason for doing so.

(2) Such a reason exists where in an automobile or private airplane accident the wrongful death occurred in an operation participated in by both parties both of whom were domiciliaries of the same state. In that case the law of that state will be applied as that whose impact both parties could have reasonably foreseen. . . .

(3) In all other cases the lex fori remains applicable unless either the plaintiff or *the defendant has been forced into a forum devoid of any such contact as would justify application of its own law.* [Emphasis added.]

[23] Tentative Draft No. 9 of the *Restatement (Second)* also includes a provision, Section 391, which is expressly applicable to suits for wrongful death:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issue involved, in which event the local law of the latter state will govern.

A note to this section makes clear that in wrongful death

III

A separate facet of appellant's public policy argument is that the Brazilian limitation on recovery for wrongful death should be disregarded entirely because of the recent marked decline in the dollar value of the Brazilian cruzeiro. Brazil's current economic problems are a matter of common knowledge, including the fact that inflation has depreciated the Brazilian currency by more than 600 per cent since the accident occurred in 1960. This development undoubtedly contributes to the appeal of appellant's argument, but it does not, in our view, warrant a result different from that we would reach had the value of the cruzeiro in terms of the dollar remained unchanged.

Brazil's interest in the protection of the financial integrity of its most important means of domestic transportation almost certainly has not been diminished by the decline in the value of its currency. Indeed, its concern may well have increased in proportion to the rate of domestic inflation. A reluctance to reflect that decline in those prices that are subject to direct government control would be wholly understandable. See text at page 10 *supra*. Moreover, an unpredictable and virtually immeasurable factor would be imported into the decision of international conflict of laws cases if the otherwise applicable law were subject to being displaced because of the recent history of the relative values of the currencies involved. Courts would be called upon in each case to determine at what point a declining rate of exchange of a foreign currency made application of the foreign law intolerable. Should Brazilian law be disregarded if the cruzeiro had depreciated only 300 per cent? Or 50 per cent? Victims of the same negligence might recover widely differing amounts,

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actions also the state of "most significant relationship" is to be ascertained "by the same principles as control selection of the law governing personal injuries in general."

depending, not on where they lived—a not irrelevant factor, as we have suggested—but on *when* they sued.

Considerations of comity among sovereign nations certainly have relevance in this context. International balance of payments problems have a way of assailing the weak and the strong alike, and it is not only the underdeveloped nations who feel the sometimes rapidly fluctuating effects upon their exchange rates of both domestic and international economic factors, over some of which at least they have little or no control. If the courts of one country make the applicability of the law of another turn on the way the exchange balance happens to be inclined at the moment, a speculative and highly artificial element would be intruded into those considerations normally recognized by civilized nations as germane in the choice of applicable law. And the forum so motivated, whether it knows it or not, wields a two-edged sword.

One further question remains, though it is one not raised by the parties.[24] The District Court converted the 100,000 cruzeiro ceiling on recovery into dollars at the rate of exchange prevailing on October 14, 1963, the date of the entry of its judgment. Although New York, alone among jurisdictions in this country, and England appear to follow a rule that recovery in tort is to be measured in terms of the rate of exchange on the date of the wrong, we think the District Court applied the sounder rule. This "day of judgment" rule has the support of the authors of the *Restatement (Second), Conflict of Laws*

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[24] Appellant's argument has been that, because the judgment in dollars reflects a striking weakness of the cruzeiro *vis-a-vis* the dollar as of the day of its entry, the forum should disregard the Brazilian limitation entirely and apply its own law. It has not asked, even alternatively, that the conversion rate used in the judgment be that either of the date of the accident or of the initial enactment of the Brazilian Air Code.

§ 612a (Tent. Draft No. 11, 1965), and is in accord with the Supreme Court's most recent decision on the point, *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 (1926). It has been endorsed by the majority of writers who have considered the problem.[25] And it has been applied by both the Second Circuit and the United States District Court in Maryland in tort cases. *Shaw, Savill, Albion & Co.* v. *The Fredericksburg*, 189 F.2d 952 (2d Cir. 1951); *The Integritas*, 3 F.Supp. 891 (D. Md. 1933). The rule provides the plaintiff with the dollar equivalent of the amount he would recover if he had sued in the country whose law determines his right to recover, and it thereby ensures that he neither suffers nor benefits from the fact that he chose another forum in which to litigate his claim.

The judgment appealed from is

Affirmed.

FAHY, *Circuit Judge, concurring:* I concur in the opinion of Judge McGowan for the court that the forum law regarding damages for wrongful death occurring in the District of Columbia does not govern this case, and that the Brazilian limitation of recoverable damages applies.

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[25] See, *e.g.*, MANN, THE LEGAL ASPECT OF MONEY 315 (1953); NUSSBAUM, MONEY IN THE LAW 372 (1950); Evan, *Rationale of Valuation of Foreign Money Obligations*, 54 MICH. L. REV. 307 (1956); Fraenkel, *Foreign Moneys in Domestic Courts*, 35 COLUM. L. REV. 360 (1935); Note, 40 HARV. L. REV. 619 (1927). Compare Gluck, *The Rate of Exchange in the Law of Damages*, 22 COLUM. L. REV. 217 (1922); Note, 65 COLUM. L. REV. 490 (1965). *Cf. Aratani* v. *Kennedy*, 115 U.S.App.D.C. 97, 317 F.2d 161, 323 F.2d 427 (1963), *cert. granted*, 375 U.S. 877, *motion for reference granted*, 376 U.S. 936 (1964).

However, were it not for the fact that plaintiff seems to concede that should the District of Columbia limitation not apply the limitation found in the Brazil Air Code governs the amount of recovery, I would leave the amount of recovery open for determination upon the basis of more ample information as to what the Brazilian law, as applied by the courts of Brazil, would permit to be recovered in this case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964.

No. 18,277 Civil 637-62

Beatrice Antonette Tramontana,

Appellant,

v.

E. A. Empresa De Viacao Aerea Rio Grandense, a Brazilian Corporation, t/a Varig Airlines,

Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Fahy, Danaher and McGowan, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party bear its own costs on this appeal.

Per Circuit Judge McGowan.

Dated: June 10, 1965.

Separate concurring opinion by Circuit Judge Fahy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 864

BEATRICE ANTONETTE TRAMONTANA,

Petitioner,

v.

VARIG AIRLINES,

Respondent.

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

In the opinion of counsel for respondent, the only question now presented is whether there are "special and important reasons" for this Court to review a decision of the U. S. Court of Appeals for the District of Columbia applying a Brazilian damage limitation to an action against a Brazilian air carrier for the wrongful death of an American serviceman, domiciled in Maryland and attached to a military unit stationed in the District of Columbia, who was killed in a mid-air collision over Brazil between the U. S. military aircraft he was aboard and a Brazilian commercial airliner on an intranational flight.

STATEMENT OF THE CASE

On February 25, 1960, Vincent Tramontana, an enlisted member of the U. S. Navy Band then on official tour of South America, was killed when a U. S. Navy R6D-1, en route from Argentina to Brazil, upon which he was a passenger collided in the airspace above Rio de Janeiro, Brazil, with a DC-3 owned and operated by respondent's assignor, Real Airlines, on a regular commercial flight from Campos, Brazil, to Rio de Janeiro, Brazil. Tramontana and petitioner were husband and wife living together in Maryland at the time of his death, and petitioner was still residing in Maryland at the time she filed suit against respondent in the U. S. District Court for the District of Columbia for the wrongful death of her husband.

Citing Article 102, Brazilian Code of the Air, which limits liability for physical injury or death arising out of mid-air collisions to a "maximum recovery" of 100,000 cruzeiros (Cr. $100,000) for each person injured or killed, the District Court awarded summary judgment for respondent on October 14, 1963, for so much of petitioner's claim as exceeded the dollar equivalent of Cr. $100,000 on that date. The judgment was affirmed by the U. S. Court of Appeals for the District of Columbia on June 10, 1965, and rehearing *en banc* was denied *en banc* on October 4, 1965.

ARGUMENT

I.

The Law of Conflict of Laws Applicable to Suits in a District of Columbia Forum Is a Matter of "Local" Law To Be Declared by the Highest District of Columbia Court.

Rule 19 of the Rules of this Court provides that judicial review on writ of certiorari will be granted only whe there are "special and important reasons" therefor. And, regardless of the importance of a question to the people of the City of Washington, this Court has traditionally declined discretionary review of cases decided by the U. S. Court of Appeals for the District of Columbia as a matter of local law, *Busby v. Electric Utilities Employees Union*, 323 U.S. 72 (1944), although accepting cases of equal importance with less reservation when that Court purports to declare the law throughout the entire Federal judicial system. See *Miller v. United States*, 375 U.S. 301 (1958). Throughout the proceedings below, petitioner made her supplication to the local law of the District of Columbia, the forum of her choice, to justify a "meaningful" recovery for the death of her decedent, notwithstanding such result would come by way of a conscious disregard of the Brazilian legislation opposed. Against her contention that the law of the District of Columbia alone should measure her damages, the respondent argued below that, should the Court of Appeals ignore the Brazilian damage limitation, it would, in fact, precipitate a question of international conflict-of-laws of a magnitude which could only be resolved by this Court. Petitioner succeeded in persuading the Court of Appeals that the law of conflict-of-laws of the District of Columbia obliged it, if not actually to ignore the *lex loci delicti*, nevertheless to inquire beyond asking merely the site of the injury to find a source of appropriate law. But upon just such an inquiry the Court found the law of the place of injury to

have been the most appropriate all along. The Court of Appeals having ultimately applied District of Columbia law to her disadvantage, therefore, petitioner now argues for the proposition she opposed below, and she says that the measure of damages for the wrongful death of an American national abroad is a matter of general Federal law rather than of concern to the State of his residence or vocation alone.

This Court has frequently said, however, that determination of the appropriate law to control cases having connections with more than one jurisdiction is a question to be resolved by the conflict-of-laws rules of the forum. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Richards v. United States*, 369 U.S. 1 (1962); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 445 (1943); *Van Dusen v. Barrack*, 376 U.S. 612, 637-638 (1964). And the Court of Appeals, declaring the law of conflict-of-laws of the District of Columbia, stated that its decision to apply Brazilian law herein

> ". . . rests upon an examination of the respective relationships of Brazil and the District of Columbia with the accident, and with the parties here involved; and a consideration of their respective interests in the resolution of this issue." (Opinion, p. 7).

A contact-by-contact analysis has been approved in the past by this Court as a proper approach to discover the most appropriate law by which to decide matters extending across territorial boundaries, and nothing in the Court of Appeals' decision departs from the approach which this Court has several times sanctioned. *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532 (1935). When a forum makes a deliberate choice, upon such an analysis, to apply the *foreign* law, there is even less reason to review its decision than when it re-

jects the foreign law in favor of its own. Cf. *Pearson v. Northeast Airlines, Inc.* (2d Cir. 1962) 309 F.2d 553, *cert. denied*, 372 U.S. 912 (1963).

Moreover, this case concerns a collision between aircraft of different nationalities, and single-aircraft accidents, to which the site of the death in issue may have no more substantial connection than to have had the misfortune to underlie the airspace in which the tragedy occurs, resemble this case only in the circumstance of death occurring in flight. See, e.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), and *Pearson v. Northeast Airlines, supra*. Admiralty cases involving a collision between vessels of different sovereigns within the territorial waters of one are identical to the case at bar in all respects save the medium in which the collision occurs, however, and, at least since the Chicago Convention of 1944, 61 Stat. 1180, the one has been as subject to the power of the contiguous sovereign as the other. Established principles of admiralty law in such cases hold that the liabilities, including limitations thereof, are governed by the law of the territorial sovereign. *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386, 395-396 (1949); *Smith v. Condry*, 1 How. 28, 33 (1843).

In any case, counsel for respondent are aware of no case, and none is cited by petitioner, in which this Court or any other has held it obligatory upon a U.S. forum to ignore an otherwise appropriate foreign damage limitation because it is the general Federal "public policy" of the United States to guarantee to all U. S. citizens an unlimited monetary recovery for the death of their kin who are killed abroad. The decided authority, in fact, is to the contrary. *Slater v. Mexican National Railroad Co.*, 194 U.S. 120 (1904).

II.

Enforcement of a Brazilian Statute by a District of Columbia Forum To Limit Damages Recoverable for the Death of a Maryland Resident in Brazil Raises No Constitutional Issue.

The balance of petitioner's Brief is devoted to an exposition of the various Constitutional provisions by which, she says, a District of Columbia forum is constrained to ignore the fact that she lives in Maryland if she chooses to sue in the District of Columbia. The Court of Appeals concluded, upon an extended consideration of Maryland law on the subject, that the courts of petitioner's home State would have applied the Brazilian damage limitation, too; it did not, and was not required to, decide whether the result would have been the same had the Tramontanas lived in the District of Columbia. But whether or not the United States Constitution compels courts throughout the Nation to give the citizen of a sister State the benefit of a rule of the forum when the law of his domicile would treat him more harshly, the effect of the Court of Appeals' decision was not to deny petitioner such an advantage merely because she was a "foreigner" before that court. The result below was not predicated upon her Maryland citizenship, but upon Brazil's comparatively greater interest in the amount of her recovery, on the facts of this case, than either Maryland or the District of Columbia. Petitioner has conceded throughout that the facts of the case make it of legitimate governmental concern to all of the jurisdictions involved. The Court of Appeals, therefore, was free to select the law of that jurisdiction to which, in its judgment, the matter was of greatest concern. Compare *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532 (1935), with *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

CONCLUSION

For the foregoing reasons, respondent prays the Court to deny the petition for a writ of certiorari.

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